

Gender equality in companies with at least 50 employees

AS FROM JANUARY 1, 2012 THE COMPANY'S INACTION CAN BE SANCTIONED

Companies with at least 50 employees must enter into a company-wide collective bargaining agreement (hereinafter "CBA") or adopt an action plan on professional gender equality before January 1, 2012, failing which they will be liable for a financial penalty.

Pursuant to the preamble of the 1946 French Constitution, *"the law guarantees to women equal rights to those of men in all areas"*. Since this declaration of principles, a great deal of progress has been made with respect to gender equality and, more particularly and for the purpose of this article, professional gender equality.

While the principle of equal pay *"for equal work or for work of equal value"* was introduced in the French Labor Code in 1972^[1], it was only with the adoption of the so-called Roudy Law on July 13, 1983 that companies were imposed the obligation to identify and quantify professional gender inequalities through the preparation of the so-called report on the comparative status of the general conditions of employment and training of women and men in the workplace.

Yet, even if this Law was an undisputable step forward, it had only little effects, just like the so-called Genisson Law of May 9, 2001 that imposed mandatory annual negotiations on professional gender equality within companies. The legislator then continued to move forward with the adoption on March 23, 2006 of a Law that, among other things, provided for the elimination of gender wage gaps by December 31, 2010^[2].

However, the Grésy report delivered to the Minister of Labor on July 8, 2009^[3] unquestionably shows that women are more negatively affected than men, notably by a higher unemployment rate, a poorer access to lifelong training in the private sector, greater job insecurity, remuneration gaps and under-representation in corporate governance bodies.

The report also indicated that in 2008 only 7.5% of the companies that declared to have a trade-union representative had entered into a professional gender equality CBA and more than half had not prepared a report on the comparative situation of men and women.

In the wake of this Grésy report, two additional Laws on professional gender equality were passed. Both aimed

at guaranteeing **effective** gender equality in the workplace. As such, the Law of January 27, 2011 on balanced representation of women and men on company boards set representation quotas on boards of directors (or supervisory committees) and, to ensure an effective balance between men and women, stipulated that any nominations to a board that failed to respect the quotas would automatically be deemed invalid and entail a temporary suspension of the payment of attendance fees.

Pursuing the same objective of enhancing effective professional gender equality, Article 99 of the Law of November 9, 2010 on the retirement reform introduced – following the example of what had been done to bolster the employment of senior citizens – a **financial penalty** for all **companies with at least 50 employees** that will not be covered before **January 1, 2012** (i) either by a CBA (ii) or, in the absence of such a CBA, by an action plan on professional gender equality.

Decree n°2011-822 of July 7, 2011 defined the content of the CBA or action plan and specified the method of calculation of the financial penalty.

Strengthened obligation to conduct negotiations on professional gender equality

How to implement the CBA or action plan: when and with whom?

Each year, companies that have a trade-union representative must engage negotiations with unions representatives on *“the objectives of professional gender equality within the company and the measures to achieve such objectives”*^[4].

In parallel, companies must submit every year to the works council:

- A report on the comparative status of the general conditions of employment and training for men and women (hereinafter Comparative Status Report or “CSR”) for companies with at least 300 employees^[5];
- A single report on the economic situation that must include information on comparative status for companies with less than 300 employees^[6].

These reports, the implementation of which stems from the aforementioned Roudy Law of 1983, constitute real concrete tools measuring the inequalities existing within a company.

The obligation to prepare such reports is certainly not new **but the main innovation of the Law of November 2010 – that will become applicable on January 1, 2012 – lies in the fact that:**

– **These reports must include an action plan intended to ensure professional gender equality based on clear, precise and operational criteria; and in the event negotiations with trade-unions fall through and no CBA is concluded, the draft action plan previously debated with the works council must be submitted to the latter’s opinion and become operational, failing which the company will be**

liable for the payment of a financial penalty.

In terms of timing, it seems essential to articulate the consultation of the works council on the draft report (CSR or single report, depending on the number of employees within the company) with the mandatory annual negotiations. As such, it is advisable to firstly organize an information meeting with the works council to present the draft report (CSR or single report, depending on the number of employees within the company) that will include the action plan. In a second stage, the company will engage negotiations with trade-unions on the basis of the draft report and action plan. Even if this is not mandatory, these negotiations could usefully be conducted concomitantly with the mandatory annual negotiations on the elimination of remuneration gaps imposed by Article L. 2242-7 of the French Labor Code. It should be noted that insofar as the working- and employment-related aspects of a CBA on gender equality falls within the sphere of competence of the works council, the latter must be consulted before the conclusion of the CBA.

Lastly, once the collective negotiation process is over, the company will organize the consultation of the works council on the action plan itself.

If a CBA is concluded, negotiations shall then be held every three years. Yet, the works council shall be consulted every year on the report (CSR or single report, depending on the number of employees within the company) and action plan.

What needs to be included in the CBA or action plan?

Pursuant to Article L. 2242-5 of the French Labor Code, negotiations on professional gender equality must be based on the elements included in the report (CSR or single report, depending on the number of employees within the company).

As such, negotiations shall notably cover the following focus areas: (i) hiring, (ii) training, (iii) professional advancement/promotion, (iv) qualification, (v) classification, (vi) working conditions, (vii) effective remuneration, (viii) balance between professional file and the exercise of family responsibilities.

The legislator wanted to make sure that the to-be-taken decisions will not merely boil down to statements of principles and good intentions:

- The CBA or action plan must address **at least three** of the eight aforementioned focus areas for companies with 300 employees or more, and **at least two** of the eight aforementioned focus areas for companies with less than 300 employees.
- In addition, **improvement targets and concrete measures** enabling to achieve these targets **must be determined**, together with **quantifiable follow-up indicators**^[7].

In the action plan, the company shall detail^[8]:

- The measures taken **over the past year** in order to ensure professional gender equality, i.e. the

company must provide a rundown of the actions taken over the past year and over the preceding year if an action plan had been previously implemented unilaterally or pursuant to a CBA. The company shall also provide explanations on actions that were contemplated but not implemented;

- The improvements targets **for the coming year** and the associated indicators (qualitative and quantitative definition of the measures to be taken to achieve these targets, assessment of the associated costs and implementation schedule).

Concretely, what are the main topics addressed in existing CBAs already implemented by French companies?

Numerous CBAs on professional gender equality have been published on the website www.egaliteprofessionnelle.org (in French only).

After reviewing some of the documentation put on line, the following themes and measures can be outlined:

- Favor gender diversity, and even the feminization of certain jobs non or weakly “occupied” by women: collaborate with the Ministry of national education to change certain gender stereotypes on jobs, pay a “particular attention” to the situation of women in the framework of proposals for jobs with responsibilities, reduce physical constraints at work, flexible working hours, etc.;
- Increase the presence of women in management positions and corporate decision-making bodies: introduction of quotas, anonymous resumes, etc.;
- Foster the professional promotion/advancement of women: organization of interviews following maternity leaves in order to identify and plan training needs and retroactive professional evolution adjustments, etc.;
- Curb the salary gaps between men and women: allocation of a specific budget of one million Euros over three years to increase the monthly salary bill of women within the group to which the company belongs, retroactive adjustment bonuses, etc.;
- Combine working life and family responsibilities: implementation of homework testing programs, development of company-sponsored childcare facilities or childcare benefits, etc.

Strengthened obligation in terms of information and communication on professional gender equality

The Law also requires companies to provide their employees with a **summary of the action plan** by posting it within the company premises and, as the case may be, by any other means adapted to the conditions in which the company operates its business.

This summary must also be made available to any person requesting communication thereof but, most importantly, **it must be published on the company’s website** (if the company has one).

The summary must at least include indicators on the respective situation of men and women in relation to (i) the median wage or the average wage, (ii) the average period of time between two promotions, (iii) the

exercise of decision-making and managerial functions. This summary must also contain the improvement targets and the related measures, together with quantifiable indicators set forth in the CBA or action plan^[9].

We can easily imagine the objective of this obligation of transparency imposed on companies with respect to the efforts made on professional gender equality: have the black sheeps on professional gender equality be exposed to a risk to their public image. In addition, the non-publication of the summary of the company's website will serve as a major hint that the company has not complied with its obligation to implement a CBA or action plan.

3. A deterrent financial penalty in case of non-compliance

What is the applicable procedure?

As from January 1, 2012, labor inspectors or labor controllers will check whether companies with more than 50 employees have effectively implemented a valid CBA or action plan.

If they consider that the company has not done so or that the CBA or action plan is not compliant, they will formally request the company to **remedy this situation within six months**, by registered letter, return receipt requested ("RLRRR").

The Company must then transmit the implemented or regularized CBA or action plan by RLRRR, failing which it may provide explanation for non-compliance with this obligation and can request to be heard, presumably by the labor inspector or labor controller^[10].

At the end of the six-month period, the *Directeur Régional des Entreprises, de la Concurrence, de la Consommation, du Travail et de l'Emploi* (Regional Director for Companies, Competition, Consumption, Labor and Employment or "DIRECCTE") will decide whether the company must pay a financial penalty and, if yes, fix the applicable penalty rate^[11] by taking into account the grounds for non-compliance^[12] put forth by the company, the measures it has implemented in relation to professional gender equality and its good faith. The DIRECCTE will have one-month as from the expiry of the aforementioned six-month period to send to the company the penalty rate and the reasons for its decision by RLRRR, and to request the company to send it within one month the amount of its total wage bill for the purpose of calculating the financial penalty.

What is the amount of the financial penalty?

The financial penalty can amount **up to 1 % of the total wage bill** paid during the period where the company is not covered by a CBA or action plan^[13]. If the company does not provide any information on the amount of its total wage bill, the penalty shall be calculated on the basis of twice the amount of the monthly social security ceiling^[14] per employee and per month included within the period during which the company is not covered by a CBA or action plan^[15].

The financial penalty is due for each full month during which the company fails to comply with its obligations, over a period from the expiry of the aforementioned six-month timeline until receipt of the valid CBA or action plan by the labor inspection^[16]. As such, the penalty applies as long as the company does not comply with its legal obligations.

Is my company exposed to the risk of penalty?

The new legal provisions concerning the action on the reduction of inequalities between men and women shall become effective on January 1, 2012. Yet, the 1% financial penalty shall not apply to companies that were covered as of November 10, 2010 by a CBA, or in absence of such a CBA, by the action plan provided for under Article L. 2245-5-1 of the French Labor Code. The new provisions shall only apply to these companies at the expiry date of their CBA or, in the absence of such a CBA, of their action plan.

On the other hand, companies that have negotiated, as from November 11, 2010, a CBA on professional gender equality that does not include the objectives to be set forth in the action plan will have to either review and complete their CBA or establish a compliant action plan that must be submitted to the opinion of the works council.

Indeed, the existence of a CBA releases companies from the obligation to conduct mandatory negotiations but not from the obligation to establish an action plan that meets the new legal requirements.

To avoid the imposition of the financial penalty, companies that do not comply with the new legislation must, therefore, either enter into a CBA or establish an action plan, ideally before the baseline date of July 1, 2012 (i.e. date of expiry of the aforementioned six-month regularization period if such period starts running as from January 1, 2012) and, in any event and at the very least, before the expiry of the six-month regularization period that will start running as from the formal request to remedy non-compliance sent by the labor inspector.

Our opinion on the true effectiveness of this new legislation on professional gender equality

The use of a financial penalty as a lever for social advancement and progress seems debatable. Other countries have chosen not to resort to this ideological penalization mechanism. This is the case of Germany that decided to encourage companies that reach or exceed the imposed gender thresholds.

In addition, even if this mechanism leads to adopting a more concrete approach of the implemented measures (actions enabling to achieve the quantifiable objectives and quantifiable follow-up indicators), it is not sure that this method will yield better results than the previous situation.

What really matters in the end is the real desire of men and women, as social actors within the company, to get things changed.

[1] Article L. 3221-2 of the French Labor Code.

[2] This December 31, 2010 deadline was repealed by the Law of November 9, 2010 on the retirement reform.

[3] Preparatory report for consultations with trade-unions and employers' organizations on professional gender equality, authored by Mrs. Grésy, member of the French General Inspection for Social Affairs

[4] Article L. 2242-5 of the French Labor Code.

[5] Article L. 2323-57 of the French Labor Code.

[6] Article L. 2323-47 of the French Labor Code.

[7] Article R. 2242-2 of the French Labor Code.

[8] Articles R. 2323-9 and R. 2323-12 of the French Labor Code.

[9] Articles D. 2323-9-1 and D. 2323-12-1 of the French Labor Code.

[10] Article R. 2242-4 of the French Labor Code.

[11] Article R.2242-5 of the French Labor Code.

[12] Grounds for non-compliance include, but are not limited to: **the occurrence of economic difficulties affecting the company, pending reorganizations or mergers, pending insolvency or bankruptcy proceedings, crossing of the threshold of 50 employees in the 12 months preceding the month in which the formal notice was sent to the company by the labor inspector** (Article R. 2242-6 of the French Labor Code).

[13] Article L. 2242-5-1 of the French Labor Code.

[14] $2,946 \text{ €} \times 2 = 5,892 \text{ €}$ for the year 2011.

[15] Article R. 2242-8 of the French Labor Code.

[16] Article R. 2242-7 of the French Labor Code.



We advise and defend our French and foreign clients on any and all legal and tax issues that may arise in connection with their day-to-day operations, specific transactions and strategic decisions.

Our clients, whatever their size, nationality and business sector, benefit from customized services that are tailored to their specific needs.

For more information, please visit us at www.soulieR-avocats.com.

This material has been prepared for informational purposes only and is not intended to be, and should not be construed as, legal advice. The addressee is solely liable for any use of the information contained herein.